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THE BONDS THAT TIE: THE POLITICS OF MOTHERHOOD AND THE FUTURE OF ABORTION RIGHTS

Mary Ziegler*

Abstract

What is the relationship between women's still predominant share of caretaking work and the constitutional recognition of a right to choose abortion? Caretaking-based rationales for abortion rights have become increasingly prominent in the Supreme Court's abortion jurisprudence, as well as in abortion-rights litigation. These justifications propose that women tend overwhelmingly to raise their own children. Consequently, as the argument goes, the decision to give birth creates a lifetime commitment for most women, and in some cases, may cost women valuable career or

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educational opportunities.

When caretaking-based rationales first appeared in the early 1970s in debate about rights to both abortion and publicly funded child care, feminist advocates and activists offered a rich account of the social, economic, and political reasons that women acted as caretakers. Between 1973 and 1992, however, the caretaking-based justifications used by feminists changed, often offering incomplete or ambiguous explanations about why women assumed the burdens of caretaking.

As we shall see, there were several reasons for the transformation of these crucial justifications for abortion rights. First, in debate about caretaking, abortion, and daycare in the 1970s, feminist advocates were best able to advance their cause when they borrowed from rather than refuted social conservatives' arguments about the importance of mothering and of the mother–child bond. Second, in debate about daycare, abortion, and the Equal Rights Amendment in the 1970s, feminists began redoubling their efforts to attract the support of homemakers.

As this Article shows, the ambiguous caretaking-based justifications that emerged in the late 1970s have involved a distinct set of tradeoffs. On the one hand, these arguments may appeal equally to those who embrace or denounce traditionally gendered parental roles. As we shall see, such claims also appear to have advanced abortion rights, as well as demands for family leave. At the same time, the ambiguity of these claims has made them susceptible to liberty-restricting interpretations. As the Court did in Casey and Carhart, judges may interpret these caretaking-based justifications in the terms advanced by daycare opponents in the 1970s: women serve as caretakers because of the psychological bonds they share with their biological children.

The Article makes apparent the history and stakes of current caretaking-based arguments for abortion. The very reasons that ambiguous caretaking-based arguments are attractive are also what make them so easy to misunderstand and to use in the service of limiting abortion rights.

INTRODUCTION

What is the relationship between women's still predominant share of caretaking work and the constitutional recognition of a right to choose abortion? Caretaking-based rationales for abortion rights have become increasingly prominent in the Supreme Court's abortion jurisprudence, as well as in abortion-rights litigation.[1] These justifications propose that

1. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852–53 (1992)

women tend overwhelmingly to raise their own children.[2] Consequently, as the argument goes, the decision to give birth creates a lifetime commitment for most women, and in some cases, may cost women valuable career or educational opportunities.[3]

When caretaking-based rationales first appeared in the early 1970s, in debate about rights to both abortion and publicly funded child care, feminist advocates and activists offered a rich account of the social, economic, and political reasons that women acted as caretakers: the systematically lower wages and less desirable jobs available to women, the prevalence of pregnancy discrimination in the workplace, and the lack of quality daycare or other child care alternatives.[4] These accounts asserted that women's caretaking role was a fact of life, but they also highlighted and attacked the social, political, and cultural reasons that some women were forced to, rather than being given the choice to be, primary caregivers.[5]

Between 1973 and 1992, however, the caretaking-based justifications used by feminists changed, often offering incomplete or ambiguous explanations about why women assumed the burdens of child rearing. In some instances, advocates simply stated without explanation that women tended to rear their own children.[6] In other cases, advocates mentioned sociopolitical or cultural explanations, but combined them with

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(plurality opinion) ("One view . . . is that the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent."); Brief Amici Curiae for National Organization for Women et al., Harris v. McRae, 448 U.S. 297 (1981) (No. 79-1268), 1980 WL 339661; Brief Amici Curiae on behalf of the National Organization for Women et al. at *12, 14–16, Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (Nos. 84-495, 84-1379); Brief for Organizations and Named Women as Amicus Curiae Supporting Appellee at *9–10, Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (No. 88-605); Brief Amici Curiae for Seventy-Five Organizations Committed to Women's Equality in Support of Respondent at *3–4, 14, 16, Stenberg v. Carhart, 530 U.S. 914 (2000) (No. 99-830); Brief of Organizations Committed to Women's Equality as Amici Curiae in Support of Respondents at *3, 5, 8, Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320 (2006) (No. 04-1144); Brief Amici Curiae for the National Women's Law Center et al. at 19, 20, 23, Gonzales v. Carhart, 550 U.S. 124 (2006) (No. 05-280).

2. *See, e.g.*, *Casey*, 505 U.S. at 928 (Blackmun, J., concurring in part and concurring in judgment in part) ("By restricting the right to terminate pregnancies, the State conscripts women into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and *in most instances, provide years of maternal care.*") (emphasis added).

3. *See, e.g.*, *id.* ("Because motherhood has a dramatic impact on a woman's . . . employment opportunities, . . . restrictive abortion laws deprive her of basic control over her life.").

4. *See* Brief Amici Curiae on Behalf of New Women Lawyers et al. at 17, 19, 20, 22, 25, 28–31, Roe v. Wade, 410 U.S. 113 (1973) (Nos. 70-18, 70-14).

5. *See id.*

6. *See, e.g.*, Brief for Organizations and Named Women as Amicus Curiae Supporting Appellee, *supra* note 1, at 9–10.

psychological arguments about why women were unwilling or unwise to give up their children.[7]

As we shall see, there were several reasons for the transformation of these crucial justifications for abortion rights. First, in debate about caretaking and daycare in the 1970s, feminist advocates were best able to advance their cause when they borrowed from rather than refuted social conservatives' and child psychologists' arguments about the importance of mothering and of the mother-child bond.[8] Second, in debate about both daycare and the Equal Rights Amendment (ERA) in the 1970s, feminists began redoubling their efforts to attract the support of homemakers. As part of this campaign, activists had reason to present motherhood as voluntary and noble rather than the product of sex stereotyping and entrenched discrimination.

As this Article shows, the ambiguous caretaking-based justifications that emerged in the late 1970s have involved a distinct set of tradeoffs. On the one hand, these arguments may appeal equally to those who embrace or denounce traditionally gendered parental roles. As we shall see, such claims also appear to have advanced abortion rights, as well as demands for family leave. At the same time, the ambiguity of these claims has made them susceptible to liberty-restricting interpretations. As the Court did in *Casey* and *Carhart*, judges may interpret these caretaking-based justifications in the terms advanced by daycare opponents in the 1970s: that women serve as caretakers because of the inherent psychological bonds they share with their biological children.[9] If women parent for this reason, as *Carhart* suggests, a decision to abort would have devastating consequences on women as well as unborn fetuses.[10] For this reason, women's caretaking role can serve as a justification for restricting rather than expanding access to legal abortion.

This Article does not offer a prescription to abortion-rights advocates about when the use of such arguments is worth the price: such a determination is best made in light of the particular legal, political, and social context of a given case. Instead, the Article traces the history,

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7. *See, e.g.*, Brief as Amici Curiae for the National Organization for Women et al., *supra* note 1, at *6–7, 29–30, 33–34.

8. For a sample of the psychological claims about the mother–child bond, *see* JOHN KENNELL ET AL., MATERNAL–INFANT BONDING: THE IMPACT OF EARLY SEPARATION OR LOSS ON FAMILY DEVELOPMENT (1976); John Kennell et al., *Maternal Attachment: Importance of the First Postpartum Days*, 9 N. E. J. Med. 460, 460–63 (1972); *see also generally* DIANE EYER, MOTHER–INFANT BONDING: A SCIENTIFIC FICTION (1992).

9. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992) (plurality opinion) (characterizing pregnancy as a role requiring "sacrifices" that "from the beginning of the human race [have] been endured by woman . . . and give[] to the infant a bond of love"); Gonzales v. Carhart, 550 U.S. 124, 159 (2007).

10. *See Carhart*, 550 U.S. at 159–60.

evolution, and stakes of a particular caretaking-based justification for abortion rights. It shows that the reasons that an open-ended caretaking-based argument is attractive—its broad appeal and its ability to persuade proponents of traditionally gendered parenting roles—are the same reasons that such a claim can be misunderstood and used against abortion-rights proponents.

The Article proceeds in five parts. Part I examines the use of feminist caretaking-based arguments in the litigation of abortion cases between 1973 and 1975. I situate these arguments in the context of a broader debate about motherhood, daycare, and bonding that took place in the first part of the 1970s. In this period, in demanding publicly funded daycare, feminists argued that many women had been forced into traditional caretaking roles by low wages, pregnancy discrimination, and sex role stereotyping.

Part II studies how the dominant feminist arguments about caretaking changed in the late 1970s in both the abortion and daycare debates. In this period, in responding to organizations opposed to both the ERA and publicly funded daycare, feminists began to borrow from the psychological- and bonding-based arguments used by their adversaries. In the daycare context, feminists began suggesting that publicly funded daycare was justified not because women had been forced to act as caretakers but rather because women required daycare in order to be able to carry out their roles in the home. At the same time, women's organizations publicly campaigned for homemakers' rights and championed the equal treatment of homemakers and career women within the women's movement.

Part III studies the evolution of related claims in the debate about family-medical leave and abortion between 1982 and 2006. In urging the reform of family-leave laws, feminists defended women's traditional caretaking roles as desirable, downplaying any sociopolitical explanation of why women were so likely to serve as primary caregivers. Similarly, in the abortion context, advocates no longer stressed the structural reasons that women overwhelmingly served as caretakers, either combining them with psychological explanations or omitting them entirely.

Part IV moves beyond the context of social-movement history and explores the tradeoffs that such arguments have involved in the Supreme Court, focusing on the decisions of *Casey* and *Carhart*. Here, first, by studying a series of sex-discrimination cases involving unwed parents, I offer historical evidence that the Court has been receptive to biological or psychological explanations of women's caretaking role, and that these explanations allowed the Court to reach conclusions that were damaging to women's liberties. It is this receptivity that makes ambiguous caretaking-based arguments for abortion open to misinterpretation: without offering a clear explanation of why women assume caretaking duties, feminists

remain susceptible to the kinds of misunderstanding that has characterized the Court's past reasoning. Part V briefly concludes.

I. MOTHERHOOD IN CONTEXT, 1973–1975

In the 1973 decision of *Roe v. Wade*,[11] feminist organizations offered a wide range of arguments for recognizing a constitutional right to abortion: denying women access to abortion was deemed to be a form of involuntary servitude under the Thirteenth Amendment, a violation of the right to decisional privacy under the Fourteenth Amendment Due Process Clause, and even a cruel and unusual punishment under the Eighth Amendment.[12] One of the claims that would prove to be the most influential came from an amicus brief presented by Nancy Stearns on behalf of New Women Lawyers, the Women's Health and Abortion Project, and Women's National Abortion Action Coalition.[13]

In part, Stearns echoed claims made in another amicus brief submitted by the National Organization for Women (NOW) and other feminist organizations. That brief described abortion access as "part of the most elementary concepts of human dignity, privacy, and equality."[14] The impact on women's equality described in the NOW brief was far-reaching: "the value of the present right to vote, to equal pay, to equal job opportunities, to choose one's marriage partner, to joint custody of children—can be sharply decreased by an unwanted pregnancy."[15] Why were these consequences the inevitable result of a right to abortion? As the NOW brief described it, an unwanted pregnancy created a lifetime commitment for most women: a woman who was "compelled to continue a physical state of pregnancy against her will" would often have to "undertake the care of a child for a minimum period."[16]

Stearns' brief offered a much more detailed explanation of why women were so likely to assume caretaking duties. Women were likely to serve as caretakers for at least two structural reasons, Stearns argued, even

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11. Roe v. Wade, 410 U.S. 113 (1973).

12. *See, e.g.*, Brief for Women's Organizations and Named Women et al. as Amici Curiae Supporting Appellants at *3, 7, 12, 23–24, 30, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18, 70-40), 1971 WL 128048; Brief as Amici Curiae for the California Committee to Legalize Abortion et al. at *1–13, Roe v. Wade, 410 U.S. 113 (1973) (Nos. 70-18, 70-40), 1972 WL 126045. For an account of the evolving equality-based claims for abortion, *see* Reva B. Siegel, *Sex Equality Arguments for Abortion: Their Critical Basis and Evolving Constitutional Expression*, 56 Emory L. J. 815, 823–26 (2007).

13. *See generally* Brief Amicus Curiae on Behalf of New Women Lawyers, *supra* note 4.

14. Brief as Amici Curiae for Women's Organizations and Named Women, *supra* note 12, at *3.

15. *Id.* at *23 –24.

16. *Id.* at *12.

in cases in which fathers had been identified and were theoretically available to help with child rearing. First, women would overwhelmingly assume caretaking responsibilities "[a]s long as women as a class earn less than men and [...] have less opportunity for advancement."[17] Moreover, women would assume caretaking duties as long as sex-role stereotyping in and outside the workplace forced them to do so. Such discrimination, Stearns asserted, would "force a woman to stay at home and take care of her children even if she has otherwise provided for their care."[18]

Stearns' argument mirrored the rich set of claims about caretaking advanced by equality-feminist organizations in the early 1970s debate about publicly funded daycare. Since 1950, there had been a ten percent increase per decade in women's workforce participation; by 1970, an estimated five million working women had preschool-aged children.[19] Reports suggested that there were too few daycare providers and that available facilities were sometimes understaffed, unsafe, or even unsanitary.[20] Partly for these reasons, in the lead-up to the 1970 White House Conference on Youth and Children, the issue of daycare took center stage.[21]

Since 1909, the White House had sponsored such conferences approximately once a decade, but the 1970 Conference promised to be radically different.[22] The official in charge of the Conference, Stephen Hess, had been publicly critical of traditional child rearing ideology and practices.[23] Indeed, Hess told the press that the Conference would "indict the nation for its vast neglect of children"[24] and reveal America to be a "society that treats its children as possessions—neglected under the impact of poverty or as a consequence of preoccupation with materialism."[25]

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17. Brief Amicus Curiae on Behalf of New Women Lawyers, *supra* note 4, at 30.

18. *Id.* at *31.

19. *See* ANDREW CHERLIN, THE MARRIAGE GO ROUND: THE STATE OF MARRIAGE AND FAMILY IN AMERICA TODAY 83–84, 93–94 (2009). For an overview of the sex equality claims that linked abortion and daycare in the period, *see* Robert C. Post and Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretations of the Family Medical Leave Act*, 112 YALE L.J. 1943, 1988–89 (2006).

20. *See, e.g.*, Maya Pines, *Someone to Mind the Baby*, N.Y. TIMES, Jan. 7, 1968, at SM71; William V. Shannon, *A Radical, Direct, Simple, Utopian Alternative to Day-Care Centers*, N.Y. TIMES, Apr. 30, 1972, at SM13.

21. On the nature of the 1970 White House Conference on Children, see, e.g., Nan Robertson, *Parley on Young Begins Its Work*, N.Y. TIMES, Dec. 15, 1970, at 57; James McNaughton, *White House Plans Conference of, by, and for Youth*, N.Y. TIMES, Jun. 12, 1970, at 18.

22. On the history of earlier White House Conferences on Children and Youth, see Rochelle Beck, *The White House Conferences on Children: An Historical Perspective*, 43 HARV. ED. REV. 664, 664 (1973).

23. *See, e.g.*, Robertson, *supra* note 21, at 55.

24. *Id.*

25. *See The Rat and the Rat-Race*, N.Y. TIMES, Dec. 13, 1970, at 202.

In 1970, the unusual orientation of the Conference attracted the attention of NOW and other women's leaders. Though the organization had primarily focused on employment equality and other issues unrelated to child care, daycare proponents in NOW saw the Conference as an opportunity to change the group's focus.[26]

Of course, NOW was not the only women's organization that campaigned for publicly funded daycare. In 1972, the National Women's Political Caucus proposed a publicly-funded-child care plank to the Republican National Convention, and the organization led the campaign to criticize the attack on working mothers levied by Dr. Benjamin Spock.[27] Radical feminist groups, like the Chicago Women's Liberation Union, and feminist organizations with non-white members, like La Conferencia de Mujeres por la Raza, also organized to identify child care alternatives.[28] However, there is reason to focus on the role NOW played in the daycare debate. In the 1970s, the daycare debate unfolded in significant part in institutional settings: during the National Conference on Children, and in the halls of Congress. A large, hierarchical, national organization like NOW was better positioned to influence debate in Congress and in other institutional settings than were small, radical groups like the Liberation Union. Moreover, by comparison to other groups, NOW was especially committed to the issue: the organization had an entire task force dedicated to the issue of child care reform.[29]

As Stearns had done in the context of abortion rights, NOW emphasized the role of sex discrimination and sex stereotyping in guaranteeing that women remained primary caregivers. In 1970, for example, Florence Dickler, the leader of the NOW Child Care Task Force, explained that the Conference offered a perfect opportunity to make child care a national priority.[30] Moreover, as Dickler explained to Wilma Scott Heide, then NOW's President, the Conference would give NOW a chance to set the terms of the daycare debate.[31] For this reason, Dickler and other members of the Task Force prepared a position paper designed to frame

26. *See* Letter from Florence Dickler to Wilma Scott Heide, Chairman of the Board, NOW (Aug. 9, 1970), on file with Schlesinger Library, Harvard University.

27. *See Abortion and Child Care Planks to Be Proposed to GOP*, N.Y. TIMES, Aug. 11, 1972, at 8; Patti Hagan, *Dr. Spock Tells Why He No Longer Sings in Praise of Hims*, N.Y. TIMES, Oct. 13, 1973, at 30.

28. *See* SARA EVANS, TIDAL WAVE: HOW WOMEN CHANGED AMERICA AT CENTURY'S END 56 (2004); ROSALYN BOXANDALL & LINDA GORDON, DEAR SISTERS: DISPATCHES FROM THE WOMEN'S MOVEMENT 166 (2001).

29. *See infra* note 30 and text accompanying (offering an example of the work done by the NOW Child Care Task Force).

30. *See* Memorandum on Why Feminists Want Child Care?, on file with Schlesinger Library, Harvard University.

31. *See id.*

debate entitled "Why Feminists Want Child Care."[32] The first key argument in the paper explained that daycare was an issue of women's rights: "Women will never have full opportunities to participate in our economic, political, and cultural life as long as they bear [child care] responsibilities almost entirely alone."[33] A second key argument challenged the idea that women's biology was their destiny.[34] The paper attacked the notion that, "because women bear children, it is primarily their responsibility to care for them, and even that this ought to the chief function of the mother's existence."[35]

At the conclusion of the Conference, delegates present voted to endorse universal, comprehensive, federally supported daycare.[36] Significantly for NOW, the Conference focused on the effects of inadequate daycare on children's development rather than on gender equality.[37] When Senator Walter Mondale and Congressman John Brandemas introduced comprehensive child care legislation in 1970, debate also centered on the question of children's development.[38] Experts supportive of federal daycare legislation, like Harvard's Dr. Jerome Kagan, contended that infants benefited from having continuity of care but stressed that "the caregiver does not need to be the biological mother."[39] Other experts in favor of the bill testified that, if "[w]isely administered, daycare [could] provide experiences that children do not receive in the home," permitting children to "establish a cooperative relationship with other children" or to discover talents that might not otherwise have been apparent.[40]

Between 1970 and 1971, NOW also emphasized the issue of children's development. Dickler instructed NOW activists to emphasize that "there is an abundance of evidence that high quality day care on a

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32. *See id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *See* Nan Robertson, *Conference on Children Urges Action on Day Care and Racism*, N.Y. TIMES, Dec. 19, 1970, at 1.

37. For examples of the focus on the issue of child development, *see, e.g.*, Peter Milius, *Administration Divided on Child Care Program*, WASH. POST, Jun. 3, 1971, at A31; *White House Conference on Children: Child Development Recommendations, Senate Labor Subcomm. on Children and Youth of the Comm. on Labor and Pub. Welfare*, 92d Congress 1st Sess. 64, 66 (1971) (statement of Dr. Jerome Kagan, Chairman).

38. *See, e.g.*, Nancy Hicks, *Specialists Hail Child Care Bill as a Step in Changing Program*, N.Y. TIMES, Sep. 12, 1971, at 28; *Day Care Needs Careful Upbringing*, N.Y. TIMES, Jan. 12, 1970, at 76.

39. Statement of Jerome Kagan, *supra* note 37, at 64, 66.

40. *White House Conference on Children—Child Development Recommendations, Before the Subcomm. on Children and Youth of the Comm. on Labor and Pub. Welfare*, 92d Congress 1, 77, 84 (Statements of Dr. Jerome Kagan and Ms. Therese Lansburgh).

national scale would be most beneficial to children of all socio-economic backgrounds."[41] Nonetheless, at Dickler's urging, NOW activists continued to frame daycare primarily as an issue of women's rights.[42] As Dickler explained in a strategy memorandum, daycare was "a central issue in making it possible for women to utilize their talents and skills."[43]

As Stearns had argued that compulsory pregnancy impacted women's equality, Dickler contended that the same was true of compulsory child rearing. Like Stearns, Dickler highlighted structural factors that contributed to women's disproportionate share of caretaking work.

Partly because of the support of organizations like NOW, Congress passed comprehensive child care legislation in December 1971.[44] However, approximately three weeks later, President Nixon vetoed the bill,[45] and his comments in doing so set off a new wave of debate about the desirability of daycare. Nixon stressed the "family-weakening implications" of the bill, charging that it "would commit the vast moral authority of the national government to the side of communal approaches to child rearing over and against the family-centered approach."[46] What were the effects of daycare on the "traditional family"? What benefits did traditional forms of child rearing offer? Why did women act as caregivers for their children, and what bearing did this have on policymaking about abortion and child care? Between 1971 and 1975, the debate about caretaking turned to these questions.

II. THE MATERNAL-INFANT BOND, 1971–75

The publicity surrounding Nixon's veto message drew new attention to longstanding criticisms of daycare. Earlier in the decade, Dr. Benjamin Spock, the ubiquitous child-development expert, had explained: "Why have children if you're going to be a cuckoo and leave your eggs in other people's nest?"[47] Experts revived these ideas after the Nixon veto; for example, Niles Newton, a well-known physician and instructor at the Northwestern Medical School, explained to the *Chicago Tribune* that after birth, "the mother should relax, enjoy herself, and give herself up to

41. *See* Letter from Florence Dickler, National Coordinator of Child Day Care, to all NOW Chapters, on file with Schlesinger Library, Harvard University.

42. *See id.*

43. *Id.*

44. Marjorie Hunter, *House Clears Poverty Bill Despite Nixon Veto Threat*, N.Y. TIMES, Dec. 8, 1971, at 1.

45. Jack Rosenthal, *For Nixon, Daycare Is An Idea Whose Time Has Not Yet Come*, N.Y. TIMES, Dec. 12, 1971, at B4

46. Shannon, *supra* note 20, at SM16.

47. *Don't Be a Cuckoo, Spock Tells Mothers*, HARTFORD COURANT, Apr. 29, 1970, at 2.

mothering for the first few years."[48] Many of these authors drew on the newly popular theory that mothers and infants enjoyed a unique and paramount biological bond.[49]

Bonding theory resembled ideas of parenting dating back to the Industrial Revolution in the nineteenth century.[50] It was only during the Industrial Revolution that current, gender-based parental roles became the cultural norm, at least for the middle and upper classes; in earlier periods, when many women were heavily involved in agricultural labor, discussions of the importance of motherhood was less widespread.[51] By contrast, in the 1840s, publications like *Parents' Magazine* and *Mother's Assistant* and books like *The Son Unguided: A Mother's Shame* argued that children's character was exceedingly flexible and that good mothering was therefore essential to a child's moral development.[52] Versions of this theory reappeared after World War II, with the publication of works by Spock, John Bowlby, Marynia Farnham, and Ferdinand Lundberg on "maternal deprivation" and related issues.[53]

What became known as bonding theory emerged in 1972, with a publication by John Kennell and Marshall Klaus in the *New England Journal of Medicine*.[54] According to Klaus and Kennell, children would develop better if mothers had an additional sixteen hours of contact with their children after birth.[55] In a national tour and series of workshops, Kennell and Klaus sought to popularize their theory around the country.[56] By 1976, when the pair published a book on the subject, *Maternal Infant Bonding*, the theory had attracted political and media interest.[57] As we shall see, a number of groups popularized and substantially expanded Kennell and Klaus's account, applying bonding theory not just to infants

48. Carol Kleiman, *Are Children With Working Mothers Really Sitting Pretty?*, CHI. TRIB., Mar. 19, 1974, at B1.

49. See, e.g., SELMA FRAIBERG, EVERY CHILD'S BIRTHRIGHT: IN DEFENSE OF MOTHERING (1977); Nicholas Anastasiow, *Dealing with Children From the Moment of Birth*, 54 PHI DELTA KAPPAN 212, 212 (1977) (reviewing JOSEPH PEARCE, THE MAGICAL CHILD: REDISCOVERING NATURE'S PLAN FOR OUR CHILDREN (1977) and explaining Pearce's reliance on the idea and importance of mother–child bonding); Wini Breines et al., *Social Biology, Family Studies, and Antifeminist Backlash*, 4 FEMINIST STUD. 43, 45–46 (1978) (explaining the use of bonding in the period of veteran feminist and professor Alice Rossi).

50. *See, e.g.*, MARTINA KLETT–DAVIES, GOING IT ALONE: LONE MOTHERHOOD IN LATER MODERNITY 63 (2007).

51. *See, e.g.*, EYER, *supra* note 8, at 101.

52. *See id.* at 105.

53. *See* JOHN BOWLBY ET AL., CHILD CARE AND THE GROWTH OF LOVE 75 (1953); BENJAMIN SPOCK, COMMON SENSE BABY AND CHILD CARE (1947); FERDINAND LUNDBERG AND MARYNIA F. FARNHAM, MODERN WOMAN: THE LOST SEX (1947).

54. Kennell et al., *Maternal Attachment*, *supra* note 8, at 460–63.

55. *See* EYER, *supra* note 8, at 2–3.

56. *See id.*

57. *See generally* KENNELL ET AL., MATERNAL-INFANT BONDING, *supra* note 8.

but to almost all young children.

There were several reasons that bonding theory won adherents. First, hospital organizations and members of the medical community saw in bonding theory a way to maintain control over the birth process.[58] By 1979, over 99% of infants were born in a hospital (compared to 50% in 1940), and a growing number of infants were spending increasing time in intensive care units, apart from their parents.[59] When parents began organizing a home-birth movement and demanding more contact with their children or control over the birth process, bonding appeared attractive to parents and to hospitals: mothers could have more contact with their children, but would do so with the aid of experts schooled in bonding theory who would help to ensure the optimal development of the children at issue .[60]

Moreover, bonding theory appealed to social conservatives concerned about the influence of the women's, gay liberation, anti-war, and civil rights movements. The traditional "cult of motherhood" had been under attack in the 1970s.[61] Since nearly one third of all women were already in the workforce,[62] social conservatives were facing arguments that their nuclear family ideals were no longer realistic. At the same time, authors like Betty Friedan were arguing that stereotypes about women's role in the home—what Friedan called the feminine mystique, which told women that they could find "fulfillment only in sexual passivity, male domination, and nurturing maternal love"—was "burying millions of American women alive."[63] Bonding theory offered social conservatives like Jerry Falwell and Phyllis Schlafly apparently scientific support for the "popular belief that women, one and all, were inherently suited for motherhood."[64]

Between 1972 and 1975, NOW members were divided as to how to respond to the newly prominent arguments about bonding. In November 1973, Tery Zimmerman, a key member of the NOW Child Care Task Force, disseminated material stating the NOW position as follows: "NOW believes that the care and welfare of children is incumbent on society and parents. We reject the idea that mothers have a special child care role."[65] Indeed, the official NOW position throughout 1972 was to oppose all

58. *See* EYER, *supra* note 8, at 11–12.

59. *See id.* at 129.

60. *See id.* at 11–12.

61. JUDITH SEALANDER, THE FAILED CENTURY OF THE CHILD: GOVERNING AMERICA'S YOUNG IN THE TWENTIETH CENTURY 12 n. 31 (2003) (describing a "1970s organized opposition to a cult of motherhood in the United States").

62. *See id.* at 127.

63. *See* BETTY FRIEDAN, THE FEMININE MYSTIQUE 92, 462 (2001).

64. *See* EYER, *supra* note 8, at 1.

65. Tery Zimmerman, Address to the NOW Child Care Task Force (Nov. 1973), on file with Schlesinger Library, Harvard University.

existing child care legislation that did not reflect the priorities set forth in "Why Feminists Want Child Care."[66]

Even in the middle 1970s, though, dissenters within NOW began asserting that the organization should borrow from, rework, or at least mute their criticisms of bonding theory. Sheila Tobias, one of NOW's founding members, circulated an influential position paper that argued the following: "Child care facilities are not 'an alternative to the nuclear family' or a 'microcosm of a collectivist society.' Rather child care can be: support for mothering.... If we could all agree to call it this, it would be impossible for opponents to argue that such institutional support inhibits normal relations between mothers and children."[67] At first, Tobias' position was not taken up by the leadership.[68] However, the anti-bonding theory stance began to weaken in the face of new opposition against NOW after Mondale and Brademas reintroduced (and failed to pass) comprehensive daycare legislation in 1975 (the Child Care and Family Services Act of 1974).[69]

And as we shall see, when feminists began to borrow from and modify claims about mother-child bonding, their caretaking-based justifications for abortion rights changed as well. No longer did feminists highlight the sociopolitical reasons that it was largely women who took on caretaking work. Instead, in order to complement bonding-based claims made in other contexts, feminists either asserted that women assumed child rearing duties without offering an explanation or tempered cultural explanations with acknowledgments of the psychological bond between parent and child.

III. KEEPING WOMEN AND CHILDREN TOGETHER, 1975–1980

There were several reasons that feminists began downplaying structural arguments in debate about abortion and daycare. One involved the battle for the Equal Rights Amendment. Phyllis Schlafly's STOP ERA, like other prominent antifeminist groups, argued against the Amendment in part by alleging that the women's movement was biased against homemakers. As early as May 1972, Schlafly prominently argued: "[the] ERA will wipe out the financial obligation of a husband and a father to support his wife and children, the most important of women's rights."[70] In 1973, she cited cases from Colorado and Pennsylvania, both of which had state ERAs, allegedly forcing wives, as well as husbands, to pay spousal

66. Wilma Scott Heide to The House Committee on Education and Labor (c. 1972), *in id.*

67. Sheila Tobias, A Feminist Perspective on Child Care (Apr. 20, 1974), *in id.*

68. *See id.*

69. *See $2 Billion Federal Child Care Measure Mulled By Congress*, ATL. DAILY WORLD, Jun. 28, 1974, at 2.

70. Phyllis Schlafly, *The Fraud Called the Equal Rights Amendment*, PHYLLIS SCHLAFLY REP., May 1972.

maintenance after divorce.[71]

By July 1974, the *New York Times* had identified Schlafly as the "apparent leader" of the ERA opposition.[72] In the same year, Schlafly reiterated her position that the ERA would "degrade the homemaker role, and support economic development requiring women to seek careers."[73] In a later interview, Schlafly explained that her primary objection to the Amendment was its potential effects on divorce law and alimony.[74] She elaborated on these worries in a 1975 edition of *The Phyllis Schlafly Report*, arguing that ERA proponents "tipped their hand" by introducing "specific bills on family support [...] in various state legislatures."[75] She told her readers how they could determine what the Equal Rights Amendment truly meant and what its consequences would be:

> All this specific legislation supported by the ERA proponents in the various state legislatures proves that—despite their denials when speaking to the press—ERA proponents are working assiduously to make the financial obligation for family support fall equally on the wife.[76]

In the mid-1970s, many advocates within NOW had verbalized the threat posed by STOP ERA and its appeal to homemakers. In order to succeed in the ERA struggle, as Toni Carabillo, a prominent NOW member, stated in a confidential strategy memorandum, NOW had to show that STOP ERA "deserve[d] neither credibility nor trust" when its members claimed to be "homemakers' champion and defender."[77] In order to accomplish this task the NOW Task Force on Marriage and Divorce proposed a comprehensive legal-reform program concerning divorce, marital property, and displaced homemakers in 1975.[78]

In appealing to homemakers, NOW had reason to temper its claims that women assumed caretaking roles as the result of sex discrimination

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71. *See* Phyllis Schlafly, *ERA Takes Property Rights Away from Wives*, PHYLLIS SCHLAFLY REP., Nov. 1973.

72. *See* Eileen Shanahan, *Opposition Rises to Amendment on Equal Rights*, N.Y. TIMES, Jan. 15, 1973, at 63.

73. *See* Phyllis Schlafly, *Effect of ERA on Family Property Rights*, PHYLLIS SCHLAFLY REP., Jan. 1974.

74. *See* Sally Quinn, *Phyllis Schlafly: Sweetheart of the Silent Majority*, WASH. POST, Jul. 11, 1974, at D1.

75. *See* Schlafly, *supra* note 71.

76. *Id.*

77. *See* Toni Carabillo, Who Really Cares About Housewives? (1977), *in* The NOW Papers, MC 496, Box 192, Folder 32, Schlesinger Library, Harvard University.

78. *See* Liz Spalding, First Report to the National Task Force on Marriage and Divorce, 2 (Feb. 1975), *in* The NOW Papers, Box 47, Folder 45, Schlesinger Library, Harvard University (summarizing concerns about title-based systems); *see also* Toni Carabillo, The Homemaker and the Woman's Movement, 1–2 (c. 1977), *in* The NOW Papers, MC 496, Box 46, Folder 42, Schlesinger Library, Harvard University.

and sex-role stereotyping. Instead of offering a claim that could be interpreted as denigrating to homemaking, as we shall see, NOW began to stress other explanations for women's role in caretaking.

A second reason for the changes made to caretaking-based arguments involved the role of antifeminists in the daycare debate itself. Since 1972, when anti-ERA organizations like Phyllis Schlafly's STOP ERA, the Anti-Women's Liberation League, and the Happiness of Women first formed,[79] ERA opponents had not connected the Amendment to daycare, focusing instead on, among other things, the alleged effects of the Amendment on the draft, divorce and alimony, and same-sex marriage.[80]

The issue of daycare came to the fore after an Ohio task force released a report in July 1975 discussing the probable effects of the ERA.[81] Among other things, the Task Force recommended government involvement in funding daycare.[82] Phyllis Schlafly immediately seized on the Report, using it to link the ERA to government-sponsored child care and to radical feminism.[83] The October 1975 edition of *The Phyllis Schlafly Report* stated that the "ERA would require the states to set-up child care centers."[84]

Between 1975 and 1977, Schlafly began presenting feminist support for daycare as a reflection of the women's movement's hostility to homemaking and motherhood. In 1975, American delegates had attended an international, UN-sponsored conference on the International Year of the Woman.[85] Encouraged by former members of the American delegation to the UN event, fifteen members of Congress, including noted feminist Bella Abzug, requested a conference sponsored by the President's Commission on IWY. In the lead-up to the 1977 Conference, Schlafly and her supporters attended and sometimes dominated the state conferences at which delegates for the national event were chosen. [86] Schlafly highlighted

79. *See, e.g.*, Patricia McCormack, *Housewives Make "Life Worth Living,"* CHI. TRIB., Apr. 1, 1972, at 14; Carolyn Toll, *Californian Pushes for Anti-Lib*, Chi. Trib., Apr. 20, 1972, at 2; *They Enjoy Being Just Girls*, HARTFORD COURANT, Apr. 5, 1972, at 6; Eileen Shanahan, *Opposition Rises to Amendment on Equal Rights*, N.Y. TIMES, Jan. 15, 1973, at 1.

80. *See e.g.*, Quinn, *supra* note 74, at D1.

81. PHYLLIS SCHLAFLY, THE POWER OF THE POSITIVE WOMAN 108–09 (1977) (discussing the impact and content of the Ohio Task Force Report); see also J. BROOKS FLIPPEN, JIMMY CARTER, THE POLITICS OF THE FAMILY, AND THE RISE OF THE RELIGIOUS RIGHT 88 (2011) (describing Schlafly's emphasis on the Ohio Task Force Report).

82. *See* SCHLAFLY, *supra* note 81, at 108.

83. *See, e.g.*, Phyllis Schlafly, *Child Care Responsibility—Family or State?*, PHYLLIS SCHLAFLY REP., Oct. 1975; Phyllis Schlafly, *Will ERA Make Child Care The State's Job?*, PHYLLIS SCHLAFLY REP., Nov. 1975.

84. *See* Schlafly, *Child Care Responsibility*, *supra* note 83.

85. EVANS, *supra* note 28, at 140.

86. *See id.* at 140–42,

opposition to federal daycare in criticizing the federal financing of IWY.[87] In particular, she described universal daycare as part of a broader anti-family agenda: "NOW is for abortion mandated in all hospitals, mandated by the government, and taught in schools [....] NOW is for taxpayer-financed kiddy care centers [.... And] NOW's primary legislative goal is ratification of the ERA."[88] As the IWY proceedings began, Schlafly stressed that federal daycare was intended only for women who were unwilling to take care of their children. As she explained to the *Los Angeles Times* in 1976, "I oppose day-care centers set up by the state. I think it's very unfair to mothers. The child is the responsibility of the parents. It's not the job of the states to look after babies."[89]

Partly because of the publicity surrounding Schlafly and her positions, child-development experts in the late 1970s began describing daycare primarily as a feminist demand. A series of works on mother-child bonding similarly linked daycare and feminism. Jules Segal, the author of the popular volume, *A Child's Journey*, explained that, while "the mother's right to an independent life outside the home cannot be denied," her "search for that life without at the same time insuring her baby's security can be costly without measure."[90] Similarly, Dr. Berry Brazelton, a professor of pediatric medicine at Harvard Medical School, criticized feminist support for daycare in the *Los Angeles Times*, explaining that "any mother who is willing to work is in trouble."[91]

By the later 1970s, NOW had modified its argumentative strategies in response to these claims. In 1977, two documents prepared by Child Development Committee Chairperson Adrienne Leaf, "Child Care Fact Sheet" and "Suggested Ways to Strengthen the Family," began to emphasize family leave and maternity leave as much as daycare in offering solutions to the daycare problem.[92] By 1980, NOW had created a National Day Care Campaign Information Sheet that described child care not as a right to which women were entitled but rather as a necessity, since

87. *See* Phyllis Schlafly, *The Pictures the Press Didn't Print*, PHYLLIS SCHLAFLY REP., Jun. 1976.

88. *See id.*

89. *See* SCHLAFLY, *supra* note 81, at 86, 159 (1977) ("Several groups see it as in their self-interest to promote a policy to replace mother care with government care. The women's liberationists are persistent pushers for this objective, based on their dogma that children are a burden from which women must be liberated."). Schlafly would continue to express this view in the 1980s. *See, e.g.*, PHYLLIS SCHLAFLY, FEMINIST FANTASIES 223 (2003) (excerpting an article, written by Schlafly in 1988 asserting that "[f]eminist ideology teaches that it is demeaning to women to care for their babies, and therefore the role of motherhood should be eliminated and daycare should become a government responsibility").

90. Wendy Dreskin, *Day Care's Effect on the Child*, L.A. TIMES, Sep. 7, 1979, at F2.

91. *See id.*

92. *See* Adrienne Leaf, Child Care Fact Sheet and Suggested Ways to Strengthen the Family (1977), on file with the Schlesinger Library, Radcliffe Institute, Harvard University.

"children are cared for by their parents, except in rare instances, whether or not their parents work."[93] According to the 1980 National Day Care Campaign Information Sheet, government assistance was designed to *preserve* traditional nuclear families, not to replace or reshape them.[94] The Information Sheet stated: "The role of government at any level is to help parents fulfill their child care responsibilities."[95] It acknowledged that many women had to work.[96] But according to the Information Sheet, the ultimate purpose of any policy was to enable parents to care for their own children.[97] The primary goals of any policy were similar to those set forth in bonding theory: "continuity of care for children [and] options to enable parents to stay at home with their children."[98]

By 1979, NOW officially took a similar position in lobbying President Carter to support greater funding for child care. A draft lobbying letter focused on the breakdown of traditional families: "How many children placed in foster care would have been spared being removed from their homes and how much public money spent on institutionalization would have been saved if preventative services such as child care were available...?"[99] Slightly later, when NOW began a National Child Care Campaign, women's-rights arguments did not play a meaningful part in the group's strategy.[100] One of the claims featured in the Campaign held that "child care contributes to a productive workforce," while others stressed "reduction of welfare and self-sufficiency for working families."[101] But the key contention was that women had to work and needed government assistance in order to maintain their role as primary caregivers.[102] As Donna Frankel, one of the NOW members in charge of the Campaign, instructed others to argue: "Families are, and should remain, responsible for the care of their children.... The need is for community support for those families without relatives when they need a second income to put food on the table and a roof over their heads."[103]

By 1975, as seen in the litigation of *Planned Parenthood of Central*

93. Nat'l Org. for Women, National Day Care Campaign Information Fact Sheet (1980), on file with the Schlesinger Library, Radcliffe Institute, Harvard University.

94. *See id.* (defining one of the goals of the National Day Care Campaign as "enabl[ing] parents to stay home with their children").

95. *Id.*

96. *See id.* ("The school age child whose mother works is now the norm, not the exception.").

97. *See id.*

98. *Id.*

99. Draft Letter from the National Organization for Women to President Jimmy Carter (1979) (on file with the Schlesinger Library, Radcliffe Institute, Harvard University).

100. Donna Frankel, The National Child Care Campaign (c. 1979), *in id.*

101. *See id.*

102. *See id.*

103. *See id.*

Missouri v. Danforth,[104] these arguments had reshaped the caretaking-based justifications for abortion rights that feminists advanced in the Court. A brief submitted by the Center for Constitutional Rights and the Women's Law Project reiterated that women deprived of fertility control would "be responsible for the rearing of a child for nearly two decades."[105] Why did women take on these responsibilities? The brief did not answer these questions, instead merely citing language from *Roe* and a lower court opinion, *Abele v. Markle*,[106] which described the adverse consequences of compelled motherhood:[107] the "difficult psychological and social adjustments" faced by mothers or the curtailment of "employment or educational opportunities."[108] However, the brief did not offer any account of why women so often assumed caretaking duties or made these sacrifices.[109]

Another powerful example of these new, ambiguous caretaking-based claims came in 1980, with the litigation of *Harris v. McRae*,[110] a case challenging the constitutionality of a ban on the Medicaid funding of abortions. In a brief submitted by NOW and the NOW Legal Defense and Education Fund, advocates reiterated claims that abortion restrictions interfered with a woman's "ability to fully participate in our society."[111] The brief highlighted the interplay of sex and class discrimination, arguing

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104. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976).

105. *See* Brief Amicus Curiae on Behalf of the Center for Constitutional Rights and the Women's Law Project at *10, Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52 (1976) (Nos. 74-1151, 74-1419).

106. Abele v. Markle, 342 F. Supp. 800 (D. Conn. 1972).

107. Brief Amicus Curiae on Behalf of the Center for Constitutional Rights et al., *supra* note 105, at *10.

108. *Id.*

109. *See id.*

110. Harris v. McRae, 448 U.S. 297 (1981). Between 1976 and 1981, the Court decided two abortion cases, *Maher v. Roe* and *Bellotti v. Baird*. *Maher* involved a Connecticut law that banned the use of state Medicaid funds for abortions. Maher v. Roe, 432 U.S. 464, 466 (1977). In that case, instead of offering caretaking-based claims, the National Organization for Women joined a brief that argued that the challenged statute had no legitimate purpose, invidiously discriminated against women who had abortions, and violated a woman's right, with her physician, to make an abortion decision. Brief Amici Curiae of the American Public Health Association et al. at *8–9, Maher v. Roe, 432 U.S. 464 (1977) (Nos. 75-1440, 75-442) (summarizing the major claims in the brief). In *Bellotti*, a case involving parental-consultation restrictions, a brief joined by the Planned Parenthood Federation of America mentioned that, for teenagers who chose to keep their children, motherhood "curtails the educational and occupational attainments of these young women and leads to a greater degree of welfare dependency and need for medical and other public assistance." Brief of Amici Curiae for the Planned Parenthood Federation of America et al. at *29, Bellotti v. Baird, 443 U.S. 622 (1978) (Nos. 78-329, 78-330). Again, however, the brief did not assert, let alone account for, women's role in caretaking. *See, e.g.*, *id.* at *9.

111. *See* Brief as Amici Curiae of the National Organization for Women, *Harris*, *supra* note 1, at *6.

that a woman's opportunities to escape poverty, "already limited because she is poor, are further restricted because she is a woman."[112]

Why were women's opportunities in career or education limited after the births of their children? The brief explained that a pregnant woman "may be forced to give up employment" and would find "[f]uture employment and educational resources" to be "seriously restricted."[113] At times, the brief tied these sacrifices to social or political factors: the sex discrimination faced by women and the lack of adequate child care options.[114] At other times, however, the brief highlighted "the emotional and practical consequences of parenthood."[115] Citing a psychological study of parent-child relationships, the brief alluded to the psychological bond between women and their children.[116] As the brief explained: "The ties that bind the parent to the child, though not susceptible to easy description, end only with the death of the parent."[117]

NOW's brief in *McRae* marked a shift in the caretaking-based justifications advanced for abortion rights. Women's role in caretaking could be attributed to structural factors, psychological bonds, or some combination of the two. As we shall see, the ambiguity of these claims made them both appealing and susceptible to misinterpretation.

IV. FAMILY LEAVE AND PRIVATE RESPONSIBILITY, 1982–2006

After the Court rejected feminist claims in *McRae*,[118] feminist advocates continued to discuss women's caretaking role primarily in the context of daycare and family leave. The child care debate did not begin again in earnest until the middle 1980s, when Congress began considering new legislation on these subjects. Representative Patricia Schroeder introduced the Parental and Disability Leave Act in 1985 (eventually called the Family and Medical Leave Act or FMLA);[119] the ultimately unsuccessful Dodd-Kildee Child Care Bill, a daycare proposal, was

112. *Id.* at *7.

113. *Id.* at *30.

114. *See id.* at *46–54.

115. *Id.* at 38.

116. *Id.* at 38–39 (quoting Therese Benedek, *Parenting During the Life Cycle*, *in* PARENTHOOD: ITS PSYCHOLOGY AND PSYCHOPATHOLOGY 185 (E. James Anthony & Therese Benedek eds., 1970)).

117. *Id.*

118. In *McRae*, the Court reasoned, as it had in *Maher*, that abortion-funding restrictions "place[] no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourage[] alternative activity deemed in the public interest." Harris v. McRae, 448 U.S. 297, 315 (1981).

119. *See* Nadine Brozan, *Infant Leave Policy: Panel Urges Policy*, N.Y. TIMES, Nov. 28, 1985, at 3.

formally introduced in both Houses in 1987.[120] Social conservatives like Schlafly attacked the FMLA, arguing that it was "yuppy" legislation that discriminated against traditional families.[121] However, social conservatives focused on the Dodd-Kildee Bill, honing the arguments made against daycare in the late 1970s. In discussing the bill, for example, Schlafly argued: "feminist ideology teaches that it's demeaning for women to be expected to care for their babies, and therefore their role in motherhood should be eliminated, and child care should become a government responsibility."[122] Allan Carlson, a child-development expert and ally of Schlafly's, linked this argument to bonding theory: "[feminists'] ideological vision, however fine in theory, cannot turn women into fathers or men into mothers."[123] Schlafly wrote in conclusion: "our policy should be to encourage mothers to care for their own babies."[124]

By 1987, NOW activists promoting the FMLA were borrowing from Schlafly's conservative rhetoric: family-leave legislation was needed if traditional families and roles were to be preserved.[125] NOW argued not that women wanted to work or had the right to work but rather that women were obligated to work.[126] The organization set out this position in a press release on the Supreme Court's decision in *California Savings & Loan v. Guerra*: "women are in the workplace to stay, [and] society must address the growing demands of the family."[127]

As they had in the daycare context, in abortion litigation, feminist advocates similarly downplayed sociopolitical, caretaking-based arguments. In a brief submitted by, among other groups, NOW, the National Women's Law Center, and the NOW Legal Defense and Education Fund in *Thornburgh v. American College of Obstetricians and Gynecologists*, advocates still insisted that fertility control was central to sex equality, describing a woman's abortion right as "nothing less than the

120. ABBIE GORDON KLEIN, THE DEBATE OVER CHILD CARE: A SOCIOHISTORICAL ANALYSIS 41 (1992).

121. *See, e.g.*, *Parental Leave—A Windfall for Yuppies*, PHYLLIS SCHLAFLY REP., Nov. 1986.

122. *See Big Brother Wants to Be Big Mama*, PHYLLIS SCHLAFLY REP., Feb. 1986.

123. *See* Allan Carlson, *Who Will Pay for Parental Leave?*, PHYLLIS SCHLAFLY REP., Jan. 1988.

124. *Federal Day Care—Sovietizing the American Family*, PHYLLIS SCHLAFLY REP., Feb. 1988.

125. Press Release, Supreme Court Decision Emphasizes Need for National Legislation (*California Savings and Loan v. Guerra*) (1987), on file with Schlesinger Library, Harvard University. For the decision in *Guerra*, see 479 U.S. 272 (1987) (holding that, consistent with the Pregnancy Discrimination Act, states may provide stronger protections against pregnancy discrimination than those specified in Title VII).

126. *See, e.g.*, Press Release, *supra* note 125.

127. *Id.*

right to control her own life."[128] However, the brief simply described the sacrifices women made in rearing their children without explaining why women were the ones likely to be tasked with child care:

> In *Roe*, Justice Blackmun touched upon the importance to women of the right to decide whether to terminate a pregnancy by referencing how pregnancy and mortality can affect a woman: higher mortality rates, physical and psychological harms, abandonment of educational plans, and loss of income and career opportunities.[129]

The brief acknowledged the burdens caretaking presented for many women. However, as feminists had begun to do when discussing caretaking in other contexts, the brief no longer stressed the structural reasons that women had to assume these burdens.[130] Significantly, the caretaking-based justifications offered in the *Thornburgh* brief were compatible with the claims feminists made in the daycare debate—claims that women's role in caretaking was voluntary and natural rather than the product of discrimination or stereotyping.

Thornburgh was a victory for feminists, as the Court struck down a Pennsylvania law that required informed consent and limited post-viability abortions.[131] In some ways, success in *Thornburgh* was foreseeable, since in 1983 the Court had struck down a similar statute in *City of Akron v. Akron Center for Reproductive Health*.[132] In comparison to *City of Akron*, however, *Thornburgh* was a greater success, since the majority echoed the equality rhetoric offered in feminist briefs in the years since the decision of *Roe*, implying that fertility control was necessary to women's equal citizenship.[133]

Given the impact of ambiguous caretaking-based claims in *Thornburgh*, it is no surprise that a similar caretaking-based claim appeared in the litigation of *Webster v. Reproductive Health Services* in 1989. *Webster* involved a Missouri law that prohibited the use of public facilities or money for abortion, banned abortions if a fetus might be viable, and

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128. Brief Amici Curiae on Behalf of the National Organization for Women et al. at 12, 14–16, Thornburgh v. Am. Coll. of Obstreticians & Gynecologists, 476 U.S. 747 (1986) (No. 84-495, 84-1379).

129. *Id.*

130. *See id.*

131. Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986).

132. In that case, the Court struck down a law that included, among other things, a parental consultation, informed consent, waiting period, and fetal remains disposal provisions. City of Akron v. Akron Ctr. for Reprod. Health Inc., 462 U.S. 416 (1983).

133. *See Thornburgh*, 476 U.S. at 772 ("A woman's right to make [the choice whether to end her pregnancy] freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.").

announced, in a preamble, that life began at conception.[134] There, a NOW brief again invoked the importance of fertility control for women seeking to be equal participants in society.[135] However, the brief offered no explanation of why women were forced to assume caretaking work or were thereby prevented from attaining equal citizenship.[136] Instead, the brief only described the obstacles faced by women caring for children.[137]

The result of *Webster* signaled to many that the debates about both abortion and caretaking had taken a sharp rightward turn. In *Webster*, a Court stocked with Reagan and Bush nominees upheld a variety of abortion restrictions.[138] In dicta, several Justices even suggested that *Roe* was "unsound in principle and unworkable in practice."[139] *Webster* made real the possibility that the Court could overrule *Roe*.

Webster became a reason for feminists to tone down radical or egalitarian defenses of abortion rights: to appeal to a more conservative Court, more conservative caretaking-based arguments made sense. Ambiguous caretaking-based arguments continued to figure in feminist abortion briefs in the early 1990s. For example, in *Hodgson v. Minnesota*,[140] a decision striking down a law requiring both parents to be notified of a minor's abortion, a brief from the ACLU, among other parties, merely asserted that "[t]eenage motherhood eliminates life choices," especially those involving education.[141] Again, however, the brief did not explain why teenagers reared the children they bore, instead offering statistical evidence of the sacrifices made by teenage mothers.[142]

Similarly ambiguous arguments figured prominently in the family-leave debate when President George H.W. Bush vetoed the FMLA in 1991 and again in 1992.[143] Responding to Bush, NOW suggested that it was in society's best interest that women continue to act as caregivers. In 1990, NOW sent out pamphlets borrowing from George Bush's own family-values rhetoric. Sent out on Mother's Day, one pamphlet described the FMLA as a gift to mothers, stressing: "[c]andy and flowers aren't

134. 492 U.S. 490, 511–22 (1989).

135. *See, e.g.*, Brief for Organizations and Named Women as Amici Curiae Supporting Appellee, *supra* note 1, at 9–10.

136. *See id.*

137. *Id.*

138. *Webster*, 492 U.S. at 513–17.

139. *Id.* at 518 (internal citation omitted).

140. Hodgson v. Minnesota, 497 U.S. 417 (1990).

141. Brief for Petitioners at 13, Hodgson v. Minnesota, 497 U.S. 417 (1990) (Nos. 88-1125 and 88-1309), 1989 WL 1127333 at *13.

142. *Id.* at *13 n.27. *Ohio v. Akron Ctr. for Reprod. Health Inc.*, the other parental-consultation case, upheld a similar law with a judicial-bypass provision. 497 U.S. 502 (1990).

143. *See* STEVEN WISENSALE, FAMILY LEAVE POLICY: THE POLITICAL ECONOMY OF WORK AND FAMILY IN AMERICA 46 (2001).

enough."[144] By 1992, NOW had publicly endorsed the idea of mothers as primary caregivers, albeit ones who often worked. In a brochure on family leave, NOW activists were told to contend that a "minimum standard for leave is needed if families are to continue playing their traditional roles."[145]

Members of Congress drew on and appeared convinced by NOW's arguments, interpreting them in a way that made women's caretaking role appear to be natural and desirable. Marge Roukema, a Republican from New Jersey and one of the key proponents of the FMLA, argued in 1992: "Are we in Washington going to tell a pregnant woman or the mother of a child dying of cancer to find another job?"[146] Missouri Senator Kit Bond, who was hardly a consistent ally of NOW, similarly argued: "We should never force a mother to leave her newborn, days after birth, in order not to lose her job."[147] These arguments played a part in debate until February 1993, when the FMLA was passed.[148]

After *Hodgson*, similar caretaking-based arguments also appeared to succeed in the litigation of *Casey v. Planned Parenthood.* A brief submitted on behalf of the petitioners by counsel at the Women's Law Project, the ACLU Foundation, and the Planned Parenthood Action Foundation noted that parenthood had a "dramatic impact" on "women's educational prospects [and] employment opportunities."[149] However, these were explanations not of why women "often bear primary responsibility for young children" but rather accounts demonstrating that caretakers suffered discrimination in the workplace.[150] By contrast, the brief offered no explanation of why women were the ones primarily responsible for young children.[151]

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144. NOW, A Mother's Day Message (1990), on file with Schlesinger Library, Harvard University.

145. NOW, The Family Medical Leave Act (1992), *in id.*

146. Marge Roukema, *Mr. Bush, Keep Your Promise to American Families*, N.Y. TIMES, Jun. 20, 1990, at A1.

147. Adam Clymer, *Senate Vote to Override President's Veto of the Family Leave Bill*, N.Y. TIMES, Sep. 25, 1992, at A1.

148. *See, e.g.*, *Washington Switches Gears*, N.Y. TIMES (Feb. 3, 1993) (showing coverage of the passage of the FMLA) *available at* http://www.nytimes.com/1993/02/03/opinion/washington-shifts-gears-family-leave-moves-forward.html?scp=1&sq=family+medical+leave+congress&st=nyt.

149. Brief for the Petitioners at *25, Planned Parenthood v. Casey, 505 U.S. 850 (1992) (Nos. 91-744, 91-902), 1992 WL 551419.

150. *Id.* at *27.

151. *Id.* at *26 n.45. Another brief joined by some feminist organizations did not at all stress sex-equality claims, focusing instead on generalized arguments about the problems with undoing what had once been recognized as a fundamental right. *See* Brief as Amici Curiae for 178 Organizations in Support of Planned Parenthood at *4–12, Casey v. Planned Parenthood of Se. Pa., 505 U.S. 850 (1992) (Nos. 91-744, 91-902), 1992 WL 12006405. In defending the concept of abortion rights, the brief primarily explored the practical difficulties of overruling *Roe* or recognizing fetal rights. *See id.* at *24–29.

Although preserving what the majority described as the "core holding" of *Roe*, *Casey* undid the trimester framework employed in the 1973 decision and offered a more nebulous and loose "undue burden" test.[152] Moreover, *Casey* put significant emphasis on the role women played in raising their children, both in explaining women's reliance on legal abortion and in describing the fundamental significance of abortion rights.[153] Like the claims offered in a series of feminist briefs, the caretaking-based reasoning in *Casey* was ambiguous, stating but not explaining women's disproportionate share of caretaking duties.[154]

The apparent efficacy of caretaking-based claims in the FMLA context and in *Casey* offered more reason for feminists further to downplay more sociopolitical caretaking arguments in the Court. In 2004, for example, in *Stenberg v. Carhart*, a case challenging the Partial-Birth Abortion Act of 2003, a brief submitted on behalf of 75 feminist organizations described but did not explain the burdens women faced as caretakers.[155] The brief suggested that the legalization of abortion had allowed women to make "unprecedented strides in employment and education" but did not explain why, absent the right to control their fertility, women were so likely to raise their own children.[156] The brief stated that "motherhood has a dramatic impact on a woman's educational prospects, employment opportunities, and self-determination," and it made apparent that the inability to access abortion resulted not only in "[p]regnancy" and "childbirth" but also motherhood.[157] However, the brief did not clearly explain why women were forced to "provide years of maternal care."[158]

Shortly thereafter, in *Ayotte v. Planned Parenthood of Northern New England*, Legal Momentum (the new legal arm of NOW) did offer a sociopolitical explanation for the caretaking burdens assumed by women. *Ayotte* concerned a facial challenge to a New Hampshire statute prohibiting any abortion for a minor until 48 hours after written notification was delivered to the minor's parent or guardian.[159] The Legal Momentum brief in the case asserted that "the pervasive presumption that women are

152. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 873–74 (1992) (plurality opinion).

153. *See id.* at 852–53, 857.

154. *See id.*

155. *See* Brief of 75 Organizations, *supra* note 1, at *3–4, 14, 16.

156. *See id.* at *3–4.

157. *Id.* at *16. In *Stenburg*, a plurality struck down the partial-birth abortion ban, citing its lack of a proper health exception. 530 U.S. 914, 936–37 (2000).

158. Brief of 75 Organizations, *supra* note 1, at *8; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 928 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

159. Ayotte v. Planned Parenthood of New England, 546 U.S. 320, 324 (2006).

mothers first, and workers second" has "forced women to continue to assume the role of primary caregiver."[160] However, the brief strongly qualified these arguments, offering an alternative, primarily psychological explanation for women's part in caregiving. As the brief explained: "While the lasting impact of bearing a child could be mitigated by surrendering the child to others to raise, in reality, fewer than one percent of children born to never-married women are placed for adoption.... This likely reflects the psychological toll of giving up a child at birth."[161] The brief even acknowledged that, because of the psychological ties between women and children, "[m]any, if not most, women find deep satisfaction in bearing and rearing children."[162]

Again, in *Gonzales v. Carhart*, a case involving a new partial-birth abortion ban, a leading feminist brief downplayed sociopolitical caretaking-based arguments. In asserting that abortion restrictions limited women's ability to participate equally in society, the brief mentioned only "potentially serious health issues and adverse effects on financial security and ability to care for family, consequences which undermine women's full and equal participation in society."[163] Indeed, in arguing against a partial-birth abortion ban, the brief emphasized the bond between women and terminally ill fetuses.[164] The brief asserted that the abortion procedure at issue in the partial-birth statute was appealing to women largely because it helped women to "cope with their devastating loss by seeing, holding, and grieving over an intact fetus."[165] The brief told several stories to this effect, quoting mothers who "got to say goodbye" or "hold [a child], be with her and love her and have pictures for a couple of hours."[166]

The ambiguous caretaking-based arguments that featured in feminist abortion briefs between 1981 and 2006 did not assert that women *should* assume caretaking duties. Rather, in explaining the importance of fertility control for women seeking to participate equally in society, these claims reneged on a clear explanation of why women were so likely to bear the burdens of child rearing. In debates about daycare and family leave, feminists had downplayed sociopolitical, caretaking-based claims in order to respond to antifeminist opponents and appeal to potentially sympathetic homemakers and lawmakers. In the abortion context, feminists increasingly offered caretaking-based claims compatible with those set forth in the debate about daycare and family leave. As we shall see, these

160. Brief of Organizations Committed to Women's Equality, *supra* note 1, at *8.

161. *Id.* at *12.

162. Brief Amici Curiae for the National Women's Law Center et al., *supra* note 1, at *19.

163. *Id.* at *23.

164. *Id.* at *19.

165. *Id.*

166. *Id.* at *20.

claims advanced the cause of feminists in sex-discrimination and abortion-rights law. However, because they were incomplete or ambiguous, these claims remained susceptible to misinterpretation by the Court. Part IV offers several case studies in order to reveal the Court's changing understandings of women's caretaking role.

V. CARETAKING IN COURT: VICTORIES AND DEFEATS

Between 1972 and 2006, the Supreme Court wrestled with the questions at the center of the debate about caretaking: was motherhood unique and uniquely valuable? When could mothers constitutionally be treated differently than fathers? Why did mothers tend overwhelmingly to be primary caregivers, and what impact should that fact have on jurisprudence affecting abortion rights or child rearing? The Court addressed these questions in two separate contexts: in sex-discrimination cases often involving unwed parents, and in defining (and redefining) the rationale for abortion rights.

The Court's treatment of caretaking in the context of unwed parenthood demonstrates that ambiguous, caretaking-based justifications for abortion rights can be easily misinterpreted. In none of the unwed-parenthood cases studied here did feminists submit briefs that presented arguments about women's part in caretaking. However, the Court's openness to arguments about caretaking and child rearing is telling. Throughout the daycare debate, the Court gradually proved to be receptive to psychological or biological explanations of women's role in caretaking—claims that could actually reinforce sex stereotypes. As we shall see, absent a clear sociopolitical explanation of why women serve as caretakers, courts may well fall back on similar biological reasoning.

A. *Stanley, Geduldig, and Gilbert: Doctrine in Flux*

In 1971, when the controversy about women's rights, comprehensive daycare, and children's development intensified, the Supreme Court was also considering the issue of gender discrimination in two cases. One, *Reed v. Reed*, involved an Idaho law allowing only men to serve as administrators of estates.[167] The other, *Stanley v. Illinois*, involved an Illinois statute requiring unwed fathers, but not unwed mothers, to successfully complete adoption proceedings in order to secure custody of their children.[168]

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167. *See* Reed v. Reed, 404 U.S. 71 (1971) (striking down a gender classification permitting only males to serve as estate administrators).

168. Stanley v. Illinois, 405 U.S. 645 (1972) (striking down on due-process grounds an irrebuttable statutory presumption that unwed fathers were unfit and undeserving of child

At first blush, the cases seemed to raise the same issue—the constitutionality of different sex classifications under the Equal Protection Clause. However, as we shall see, the Court saw and decided the cases very differently. Only the dissenting Justices discussed—and rejected Stanley's claims.[169].

This partly reflected policy debate in the period about deadbeat fathers, fairness to illegitimate children, women who chose to be single mothers, and down-trodden welfare mothers exploiting the system.[170] In a series of cases prior to *Stanley*, the Supreme Court created some constitutional protections for illegitimate children.[171] But to what protections were unwed parents entitled? Were unwed mothers and fathers in the same position, for constitutional purposes?

Stanley offered the Court an opportunity to intervene in these debates. Peter Stanley, a father of three, had by most accounts been a good father.[172] He had been in an "intermittent" relationship with Joan Stanley, the mother of his children.[173] When Joan passed away, Peter lost all three of his children because of an Illinois statute declaring all illegitimate children to be wards of the state upon the death of their mother.[174]

Peter Stanley insisted that he had been the victim of gender discrimination.[175] But as we shall see, the Supreme Court did not agree. A majority of the Court agreed that Stanley had been deprived of procedural due process—he should have been given a hearing before his children were taken away.[176] Only the dissenting Justices discussed—and rejected

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custody absent their initiation of adoption proceedings).

169. *Id.* at 665 (arguing that unwed fathers are not similarly situated to unwed mothers and may be treated differently under law because "unwed fathers, as a class, are not traditionally quite so easy to identify and locate" and because "[m]any of them either deny all responsibility or exhibit no interest in the child or its welfare").

170. On the discussion of "deadbeat dads," see, e.g., Linda Lane, *On The Track of the Unwed Father*, N.Y. TIMES, Sept. 26, 1976, at LI22; Wolfgang Saxon, *Welfare Drive Seeks to Locate Absentee Fathers*, N.Y. TIMES, Aug. 8, 1976, at 42. On debate about the choice to remain a single mother, see, e.g., Murry Frymer, *An Unwed Mother With a Son, 4, Opts to Stay Single and Raise Him Alone*, N.Y. TIMES, Oct. 29, 1972, at 72; Georgia Bullea, *The Increasing Single-Parent Family*, N.Y. TIMES, Dec. 3, 1974, at 46.

171. For contemporary coverage of the Supreme Court's illegitimacy decisions, see, e.g., Lesley Oelsner, *An Illegitimacy Ban in Inheritance Set*, N.Y. TIMES, Apr. 27, 1977, at 17; *Court, in Shift, Rules a State Can Deny an Inheritance to Illegitimate Children*, N.Y. TIMES, Mar. 30, 1971, at 19. For examples of those decisions, see, e.g., Trimble v. Gordon, 430 U.S. 762, 774-76 (1977); Gomez v. Perez, 409 U.S. 535, 538 (1978).

172. *See Stanley*, 405 U.S. at 655 ("[N]othing in this record indicates that Stanley is or has been a neglectful father").

173. *Id.* at 646.

174. *Id.*

175. *Id.* at 647.

176. *Id.*

Stanley's claims.[177] In a memorandum to the Court, Justice Blackmun elaborated on this point:

> The mother surely has something that the father does not possess. Yet, for me, the case does not automatically lead to a reversal. There are sociological and biological factors present. The fact of maternity is easily ascertained. The fact of paternity outside of wedlock is not so easily ascertained.... We have always assumed that the mother is closer during the years of infancy than the father.[178]

Because *Stanley* was primarily decided on due-process grounds, the Court postponed addressing whether there were real, constitutionally significant differences between mothers and fathers.[179] Nonetheless, *Stanley* marked the Court's entry into the debate about childcare, motherhood, and bonding.

For several years after *Stanley*, questions about the meaning of motherhood remained mostly under the surface. However, in *Roe v. Wade*, in his explanation of why constitutional privacy rights were broad enough to reach the abortion decision, Justice Blackmun stressed some of the social, political, and economic ramifications of motherhood.[180] *Roe* described abortion as involving not simply the impact of pregnancy on a woman but also the impact of child rearing in the years to come.[181] Women confronted with "additional offspring" might "face a distressful life and future."[182] It was not simply pregnancy that was the problem, as *Roe* described it.[183] It was also the case that a woman's "[m]ental and physical health may be taxed by *child care*."[184]

In *Roe*, the assumption that mothers served as caretakers unquestionably seemed to advance abortion rights. After all, the assumption played a part in dicta justifying the recognition of a right to abortion. Blackmun picked up on and modified the kind of sociopolitical, caretaking-based claim advanced by Nancy Stearns' brief in the case.[185] However, unlike Stearns' brief, *Roe* offered no explanation of why women

177. *Stanley*, 455 U.S. at 665 (arguing that unwed fathers are not similarly situated to unwed mothers and may be treated differently under law because "unwed fathers, as a class, are not traditionally quite so easy to identify and locate" and because "[m]any of them either deny all responsibility or exhibit no interest in the child or its welfare").

178. Harry Blackmun, Memorandum to the Conference (Aug. 17, 1971), *in id.*

179. *See Stanley*, 405 U.S. at 649–58.

180. *Roe v. Wade*, 410 U.S. 113, 152 (1973).

181. *See id.* at 153.

182. *Id.*

183. *See id.*

184. *Id.* at 154 (emphasis added).

185. *See id.*

act as caregivers.[186]

But might assumptions about motherhood limit women's freedom as well as expand it? Some clues can be drawn from the Court's now notorious decision in *Geduldig v. Aiello*.[187] Carolyn Aiello, Elizabeth Johnson, Augustina Armendiaz, and Jacqueline Jaramillo were working for the state of California when they got pregnant.[188] The state denied them disability coverage.[189] Feminists joined briefs submitted in *Geduldig*, but did not include caretaking-based claims. For example, NOW joined a brief contending, among other things, that the pregnancy exclusion was an unconstitutional form of sex discrimination and an impermissible burden on women's reproductive autonomy.[190] However, before it reached the Supreme Court, it was clear that *Geduldig* would touch on some of the questions at the center of the daycare debate: whether pregnant women would or should return to work after childbirth.[191] At Conference in March 1972, the Justices clearly decided to uphold the California statute.[192] How to preserve the statute proved to be a harder question. As Blackmun's clerk indicated in a bench memo, California relied on claims about the uniqueness of pregnancy and motherhood, suggesting that regulations concerning conditions or traits unique to women were constitutionally permissible.[193] Nonetheless, the Justices had little interest in confronting

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186. *See id.*

187. Geduldig v. Aiello, 417 U.S. 484 (1974) (upholding a California state disability policy that excluded pregnancy-related conditions).

188. *Id.* at 489.

189. *Id.*

190. *See, e.g.*, Brief for ACLU et al. as Amici Curiae Supporting Respondents at 18–26, Geduldig v. Aiello, 417 U.S. 484 (1974) (No. 73-640), 1974 WL 185753.

191. *See, e.g.*, Mike Causey, *Major Changes Considered in Employee Leave System*, WASH. POST, Feb. 23, 1966, at A2 (explaining concern about "sick leave abuse" by mothers with no intention of returning to work). Prominent lawsuits also drew attention to claims that women with children never returned to work. *See, e.g.*, *Union Sues Illinois Bell Seeking Disability Pay for Pregnant Women*, WALL ST. J., Apr. 16, 1973, at 3.

192. *See Geduldig v. Aiello*, Conference Notes, 1-2 (Mar. 29, 1974), *in* The Harry Blackmun Papers, Box 188, *Geduldig v. Aiello*, Library of Congress. (At Conference, Chief Justice Burger also spoke for a majority of six in reasoning that the California classification was not sex based.)

194. *See* Harry Blackmun, Memorandum to the Conference, 4-5 (Mar. 25, 1974), *in* The Harry Blackmun Papers, Box 188, *Geduldig v. Aiello*, Library of Congress. The divide about the standard of scrutiny applicable in gender-discrimination cases dated back to the Court's Conference in *Frontiero v. Richardson*. 411 U.S. 677 (1973) (plurality decision). Justices Stewart, Powell, and Harlan argued against extending strict scrutiny to sex-based classifications before the ERA was ratified, insisting that the Court should not "reach [...] out and anticipate a major political decision which [was] currently in process of resolution by the duly prescribed constitutional process." *See* Lewis Powell to Harry Blackmun (Mar. 2, 1973), *in* The Thurgood Marshall Papers, Box 109; *Frontiero v. Richardson*, Library of Congress. Justices White and Brennan, by contrast, favored a strict scrutiny approach partly because "Congress [had] submitted a constitutional amendment making sex discrimination

the issue raised by California. This hesitancy appeared to stem from divisions on the Court about whether sex classifications should be subject to strict scrutiny and whether the Court should wait to decide the issue until the ERA campaign came to an end.[194]

Although mentioning the issue of sex discrimination only in a footnote, *Geduldig* ultimately adopted the argument made by California: that mothers were verifiably and constitutionally different from men and childfree women.[195] By recognizing a stand-alone category for pregnant women, *Geduldig* again hinted that the Court was receptive to the idea that motherhood was unique in a constitutionally meaningful way.[196] . Further evidence of this kind can be found in the deliberations in a virtually identical case under Title VII, *General Electric v. Gilbert.*[197]

Gilbert was a more troubling case for the Justices. Justices Blackmun, Powell, and Stevens expressed new doubt about the correctness of *Geduldig* and its application to *Gilbert.* [198] In trying to make up his mind, Blackmun highlighted materials from the ERA debate suggesting that the Amendment "would not prohibit reasonable classifications based on characteristics that are unique to one sex."[199] Blackmun underlined "child-

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unconstitutional." William Brennan to Lewis Powell (Mar. 6, 1973), *in id.*; Byron White to William Brennan (Feb. 15, 1973), *in id.* Justice Douglas had suggested that a strict scrutiny standard be applied only in the case of sex classifications "[f]or the purposes of employment." *See* William Douglas to William Brennan (Mar. 3, 1973), *in id.*

194. *See* Harry Blackmun, Memorandum to the Conference, 4-5 (Mar. 25, 1974), *in* The Harry Blackmun Papers, Box 188, *Geduldig v. Aiello*, Library of Congress. The divide about the standard of scrutiny applicable in gender-discrimination cases dated back to the Court's Conference in *Frontiero v. Richardson.* 411 U.S. 677 (1973) (plurality decision). Justices Stewart, Powell, and Harlan argued against extending strict scrutiny to sex-based classifications before the ERA was ratified, insisting that the Court should not "reach [...] out and anticipate a major political decision which [was] currently in process of resolution by the duly prescribed constitutional process." *See* Lewis Powell to Harry Blackmun (Mar. 2, 1973), *in* The Thurgood Marshall Papers, Box 109; *Frontiero v. Richardson*, Library of Congress. Justices White and Brennan, by contrast, favored a strict scrutiny approach partly because "Congress [had] submitted a constitutional amendment making sex discrimination unconstitutional." William Brennan to Lewis Powell (Mar. 6, 1973), *in id.*; Byron White to William Brennan (Feb. 15, 1973), *in id.* Justice Douglas had suggested that a strict scrutiny standard be applied only in the case of sex classifications "[f]or the purposes of employment." *See* William Douglas to William Brennan (Mar. 3, 1973), *in id.*

195. *See Geduldig*, 417 U.S. at 496 n.20 ("While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification...The program divides potential recipients into two groups—pregnant women and *non-pregnant persons.*") (emphasis added).

196. Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (upholding the pregnancy exclusion in General Electric's disability challenge under Title VII).

197. See *id.* (distinguishing pregnant women from men and all "non-pregnant persons").

198. Conference Notes, *Gen. Elec. Co. v. Gilbert* (Nov. 15, 1976), *in* The Harry Blackmun Papers, Box 239, *Gen. Elec. Co. v. Gilbert*, Library of Congress.

199. *See* Memorandum to Justice Blackmun, 6–7 (Mar. 1976), *in id.*

bearing" as the key difference of this kind.[200] Other materials drew on statements of ERA proponents like Representative Martha Griffiths to the effect that "the equal rights amendment would not affect laws unique to one sex, such as laws governing childbirth."[201] During deliberations about *Gilbert*, moreover, the Court's willingness to accept arguments about the uniqueness of motherhood went beyond child-bearing. Blackmun understood that abortion laws recognized differences between mothers and fathers, acknowledging that the states could "regulate abortion in accordance with *Roe* even though the legislation would affect only one sex."[202] Justice Powell, who held another deciding vote, suggested that mothers generally sacrificed careers for child rearing.[203]

When *Gilbert* was finally issued in 1976, the Court firmly endorsed the idea that discrimination based on motherhood was not sex discrimination.[204] However, the majority opinion offered little guidance as to why motherhood was constitutionally unique. The Justices' response to this question came several years later, after the political consensus about mother-child bonding had been reinforced.

B. Bonding in the Court: Caban

When the Court again considered the issue, political debate about daycare and motherhood had reached an equilibrium. Even NOW abandoned arguments that publicly funded child care was a woman's right. Instead of contending that women were not necessarily better caretakers, as we have seen, NOW leaders sometimes echoed claims that mothers did a better job of caring for children than did fathers, other relatives, and professionals, although feminists used these claims for a progressive end—the demand for rights to family leave.

By 1979, the emerging consensus about motherhood within the Court mirrored the one evolving outside it. The Court then addressed two opinions on the differences between unwed mothers and fathers. One case, *Parham v. Hughes*, involved a Georgia statute allowing unwed mothers, but not unwed fathers, to sue for a child's wrongful death.[205] The other, *Caban v. Mohammed*, concerned a New York law allowing unwed mothers, but not unwed fathers, to unilaterally block an adoption by withholding consent.[206]

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200. *Id.*

201. *Id.*

202. *Id.* at 8–9.

203. Conference Notes, *supra* note 198, at 2.

204. *Gen. Elec. Co.*, 429 U.S. at 123–29.

205. Parham v. Hughes, 441 U.S. 347 (1979) (upholding a law permitting unwed mothers, but not fathers, to sue for the wrongful death of an illegitimate child).

206. Caban v. Mohammed, 441 U.S. 380 (1979) (holding invalid a gender classification

Caban was the father of two children by his ex-girlfriend Maria Mohammed.[207] Maria had moved out of the apartment that the pair had shared in New York City, and met and ultimately married another man who wanted to adopt Caban's two children.[208]

Did Caban have the same rights as his former girlfriend? In 1978, when the Court was conferencing the case, it was apparent that *Caban* would be the lead decision and that the vote would be close.[209] Justices Burger and Rehnquist were firm votes to affirm the constitutionality of the statute, while Justices Brennan, Marshall, and White clearly favored the opposite outcome.[210] Although the remaining Justices were undecided, Justice Stewart offered a rationale for upholding the New York statute based on the idea of mother-child bonding.[211] He explained that in "nine out of ten cases, New York would find a father disqualified from making decisions for a child."[212] The statute was not based on a gender stereotype, Stewart concluded, but on "practical fact."[213]

By January 1979, it became clear that Justice Blackmun held the deciding vote in the case.[214] No longer undecided, Stewart and Stevens had come to the conclusion that the statute was constitutional, and firmly endorsed bonding arguments.[215] Blackmun's clerk described this position as follows:

> The Equal Protection Clause aims to proscribe discrimination based on mere "status:" the status of being black, the status of being female and so on. The Equal Protection Clause, accordingly, proscribes gender discrimination only when it is based on gender per se; it [this classification]is based, rather, on what might be called "parenthood." It is a common-sense fact that unwed mothers and unwed fathers are not similarly situated as regards infant children. The discrimination between them, therefore, is not invidious discrimination based on "sex," but a

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in a New York adoption law in response to an as-applied challenge).

207. *Id.* at 381–82.

208. *See id.*

209. *See* Memorandum to Justice Blackmun concerning *Caban v. Mohammed* (Jan. 22, 1979) (on file with the Library of Congress, Box 290); Memorandum to Justice Blackmun concerning *Caban v. Mohammed*, 1-2 (Nov. 8, 1978), (on file with the Library of Congress, Box 290) (explaining that the outcome and assignment of *Parham* would depend on the holding and reasoning of *Caban*).

210. *See* Conference Notes, *Caban v. Mohammed*, 1-2 (Nov. 8, 1978), (on file with the Library of Congress, Box 290).

211. *Id.*

212. *Id.*

213. *Id.*

214. *See* Memorandum to Justice Blackmun concerning *Caban v. Mohammed* (Jan. 23, 1979), on file with the Library of Congress (explaining that, before Blackmun chose a side, the vote on the case was 4-4).

215. *See id.*

> reasonable classification based on their differing roles vis-à-vis the child; the gender classification, as it were, is only fortuitous—the accidental feature of the real differences between "mothers" and "fathers."[216]

By contrast, Justice Powell's proposed majority took up the anti-stereotype arguments advanced by NOW before 1975.[217] As Blackmun's clerk summarized, the Powell opinion "rejected any distinction between natural parents on the grounds of the intimacy of their relationship with the child."[218] As Blackmun's clerk described it: "any suggestion that mothers were closer to their children, or that natural fathers were scoundrels uninterested in their offspring, was rejected as an archaic and overbroad generalization."[219]

After Powell circulated his first draft, it became apparent that no majority would support anti-stereotype claims of the kind once advanced by NOW.[220] Rather than lose his majority, Powell rewrote the draft in order to address Blackmun's concerns.[221] The new draft struck down the New York statute but implicitly endorsed arguments based on mother-child bonding.[222]

In response to the concerns of the other Justices, Powell acknowledged: "most unwed fathers are less close to their children, are irresponsible, and hard to locate."[223] The state could permissibly distinguish between unwed mothers and fathers so long as unusual fathers, like the father in *Caban*, could prove themselves to be exceptions to the general rule.[224]

Although voting to invalidate the New York statute, Powell seemed to recognize the bonding claims that emerged from political debate. He acknowledged that mothers often had "a significantly closer [bond] to the child during infancy."[225] Without violating the Constitution, he conceded, the government could acknowledge that "unwed fathers are less close to their children than unwed mothers."[226]

Caban made clear what earlier cases suggested: the Court was

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216. *Id.*

217. *See* Memorandum to Justice Blackmun, 1 (Jan. 17, 1979), (on file with the Library of Congress).

218. *Id.*

219. *See id.*

220. *See* Memorandum (Jan. 23, 1979), *supra* note 214, at 2 (explaining Blackmun's reluctance to sign onto Powell's earlier draft majorities).

221. *See id.*

222. *Id.*

223. *Id.*

224. *See id.*

225. *Id.*

226. *Id.*

receptive to biological or psychological explanations of women's role in caretaking. It is precisely this openness that makes leading (and ambiguous) caretaking-based justifications for abortion susceptible to misinterpretation. Given the Court's past interest in biological explanations, a claim stating that women *do* serve as caretakers can, without further explanation, be misread as an argument that women *should* do so.

C. *Caretaking, Ambiguity, and Abortion*

The core of *Casey*'s equality-based reasoning comes with the opinion's account of the rationale for *Roe v. Wade*.[227] At first, *Casey*'s analysis seems limited to the effects of childbirth on women's place in society: "The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear."[228]

This portion of *Casey*'s reasoning is difficult to question: after all, only women can get pregnant or give birth. Shortly thereafter, however, *Casey* speaks in broader terms about the effects of child rearing on women's equal citizenship, explaining that the abortion decision affects "the destiny of the woman."[229] *Casey* goes on to describe abortion as an issue of women's "responsibility."[230] Although describing "infinite variations" in opinion on rightness of abortion, *Casey* most clearly describes two choices—the decision to "provide for the child and ensure its wellbeing" or choose abortion because inadequate "care of a child is a cruelty."."[231]

These observations explain the Court's conclusion that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[232] *Casey* implies that procreation affects women's equality interests not only because women bear children but also because women rear them.[233] If women are the ones assuming caretaking responsibilities, the impact of a pregnancy will necessarily continue long after a child is born.

At times, *Casey*'s understanding of the caretaking role played by women is compatible with the kinds of sociopolitical explanations offered by Nancy Stearns in 1973. The opinion describes "anxieties and physical

227. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852–53 (1992) (plurality opinion).

228. *Id.* at 852.

229. *Id.*

230. *See id.* at 853.

231. *Id.*

232. *Id.* at 856.

233. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992) (plurality opinion).

constraints" faced by "[t]he mother who carries a child to full term" and unequivocally asserts that those duties may not be forced on her: "That these sacrifices have from the beginning of the human race been endured by the woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice."[234] Concurring in part and dissenting in part, Justice Blackmun drew on similar caretaking-based justifications: "By restricting the right to terminate pregnancies, the State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care."[235]

However, as had many feminist briefs in recent abortion litigation, *Casey* offered an ambiguous and even contradictory account of *why* women are the ones overwhelmingly likely to assume caretaking duties. In that case, biology-as-destiny arguments at times provide the answer to this question. *Casey* appears to take this approach in its discussion of the informed-consent provision of the Pennsylvania law, which required physicians to provide women with information about, among other things, a fetus's probable gestational age.[236] In analyzing this provision, the Court focused on the psychological damage and harm done to women who had abortions.[237] The majority suggested that "most women... would deem the impact on the fetus relevant, if not dispositive, to the decision."[238] The opinion even suggests that many women choosing abortion would regret it: the statute was justified, according to *Casey*, because it reduced "the risk that a woman [might] elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed."[239] The informed-consent analysis implied that women would regret abortion because, given the primacy of the bonds they shared with their children, mothers would naturally make decisions based on their concern for the welfare of the child or fetus.

At other times, of course, *Casey* criticizes biology-as-destiny arguments: first, in explaining that the State could not "insist, without more, upon its own vision of the woman's role," [240] and second, at greater length, when invalidating the Pennsylvania spousal-notification

234. *Id.* at 852.

235. *Id.* at 928 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

236. *Id.* at 881.

237. *See id.* at 882.

238. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992) (plurality opinion).

239. *Id.*

240. *Id.* at 852.

provision.[241] Is this the "true *Casey*"?

There is no clear answer to this question, but the Court's recent decision in *Gonzales v. Carhart* offers a cautionary note. In that case, the Court upheld the Partial Birth Abortion Act.[242] *Carhart* is perhaps better known for its rhetoric than for its reasoning: the decision famously described "the bond of love a mother has for her child" as the "ultimate expression of respect for human life."[243] The Court went on to predict that some, if not many, women "regret their decision to abort the infant life they once created."[244] Because so many women would regret choosing abortion, the Court suggested, it was reasonable to force doctors to provide certain information designed to discourage abortion, and it was justifiable to force women to consume that information.

As we have seen, *Carhart* makes clear the difficulties of the gender-role arguments at work in *Casey*. According to *Carhart*, as the Article has argued, *Casey* already recognized the unique impact of childbearing on women. For related reasons, as *Carhart* stated, the government could restrict abortion based on an assumption that women would not choose abortion if they were fully informed about its consequences.[245]

Casey and *Carhart*, like *Caban*, highlight the tradeoffs involved in making ambiguous caretaking-based claims. On the one hand, such claims are more likely to appeal to judges inclined to invoke the "pride that ennobles [a mother] in the eyes of others" and the "bond of love" she shares with her infant.[246] On the other hand, non-structuralist, caretaking-based claims are easily open to misinterpretation. Without a clear argument that women are sometimes forced by circumstances into child rearing, some courts have been inclined to read caretaking-based arguments in the terms provided by Schlafly or other antifeminists: that women are better caregivers than men, are psychologically predisposed to serve as caregivers, and will harm both themselves and their children if they do not assume caretaking duties.

VI. CONCLUSION

Caretaking-based justifications for abortion rights have played an increasingly important part in abortion jurisprudence and litigation. However, as this Article shows, the dominant forms of caretaking-based

241. *Id.* at 896 (arguing that state regulation impairing abortion rights "will have a far greater impact on the mother's liberty than on the father's").

242. Gonzalez v. Carhart, 550 U.S. 124, 168 (2007).

243. *Id.* at 159.

244. *Id.* at 129.

245. *See, e.g., id.* at 129, 159, 168.

246. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992) (plurality opinion).

claims have changed substantially over time and have done so partly in response to the social-movement debate about motherhood, daycare, family leave, and abortion. In order to attract support for child care reforms, feminists modified their caretaking-based claims, both inside and outside the context of abortion. In particular, members of NOW and other women's groups deemphasized structural arguments, either combining them with psychological accounts of the parent-child bond or omitting them entirely.

There were several historical reasons for this shift. First, in the daycare debate and in abortion litigation, in responding to antifeminists, women's groups borrowed from and reworked bonding-based arguments, offering a less clear explanation of why women served as caretakers. Second, in order to appeal to homemakers, politicians, and jurists supportive of or sympathetic to traditional gender roles, women's groups had reason to present caretaking work as the product of free choice and altruism rather than of discrimination or stereotyping. For the same reasons, women's groups had reason to reframe their caretaking-based claims in the context of abortion.

These ambiguous caretaking-based claims have involved a distinct set of tradeoffs. On the one hand, such a claim has broad appeal, proving equally attractive to those who approve or disapprove of traditional parental roles. Moreover, such claims appear to have been influential: the Court in *Casey* has invoked similar rhetoric. On the other hand, because such claims are ambiguous and open-ended, they are susceptible to misinterpretation. Often, as was the case in *Carhart*, the Court can read caretaking arguments in the terms advanced by daycare opponents in the 1970s: women act as caretakers because of the paramount, psychological bond between mother and child. Framed in these terms, women's role in caretaking can be understood as a justification for restricting rather than protecting abortion rights.

How ought feminists to react? One possibility is to offer a stronger and clearer account of the political and social reasons that women tend to serve as caretakers. Another is to acknowledge and accept the benefits and disadvantages of ambiguous caretaking-based claims. As the history studied here shows, the choice to use these arguments may be the right one, but as in the past, it will be a calculated risk.